FILED
APR 4 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD, *Appellant,*

v.

GERHARD H. FRITZ, *Appellee.*

On Appeal From The United States District Court For The Southern District Of Indiana

BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

EDWARD D. FRIEDMAN
CLINTON J. MILLER, III

HIGHSAW, MAHONEY & FRIEDMAN, P.C.
Suite 210
1050—17th Street, NW
Washington, D.C. 20036
(202) 296-8500

Attorneys for the Railway Labor Executives' Association as Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS CURIAE 1

STATEMENT OF CASE 3

ARGUMENT 7

CONCLUSION 11

CITATIONS

CASES:

Allied Stores of Ohio, Inc. v. *Bowers,* 358 U.S. 522 (1959) 7

Flemming v. *Nestor,* 363 U.S. 603, 611 (1960) 7

Hisquierdo v. *Hisquierdo,* 439 U.S. 572 (1979).. 3, 8-10

New Orleans v. *Dukes,* 427 U.S. 297, 305 (1976) ... 10

San Antonio School District v. *Rodriquez,* 411 U.S. 1, 16-39 (1973)..... 7

Weinberger v. *Salfi,* 422 U.S. 749, 768 (1975)..... 7-8

STATUTES:

Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §§ 231-231t (1976 ed.)..... 3, 4, 9

§ 231(h) 8

Social Security Act, 42 U.S.C. §§ 301 *et seq.* 4

28 U.S.C. § 1252 1

Table of Citations Continued

PAGE

MISCELLANEOUS:

Legislative History of the Railroad Retirement And Railroad Unemployment Insurance Systems, Railroad Retirement Board (1978) 6

H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974) 5, 6, 8

S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974) .. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-870

UNITED STATES RAILROAD RETIREMENT BOARD, *Appellant,*

v.

GERHARD H. FRITZ, *Appellee.*

On Appeal From The United States District Court For The Southern District Of Indiana

---

BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

The Court noted probable jurisdiction of this appeal in an order entered February 19, 1980. Jurisdiction of the appeal is granted by 28 U.S.C. § 1252. This *amicus* brief is submitted to the Court pursuant to Rule 42(b), written consent of the parties having been obtained.

INTEREST OF AMICUS CURIAE

The motion for leave to file the *amicus* brief in support of the Jurisdictional Statement describes the deep interest of the Railway Labor Executives' Association, as the association of all railway labor unions representing all classes and crafts of railway employees, in any

matter, including this case which affects the basic pension system for railroad employees.

The Railroad Retirement Committee of the Railway Labor Executives' Association served as the labor members of the Joint Labor-Management Railroad Retirement Negotiating Committee and was intimately involved in the design of the legislative proposals to restore the financial integrity of the railroad pension system. The threat to the continuing existence of the Railroad Retirement program was so severe during the period of this legislation that radical restructuring was essential if the system were to survive. In the course of the consideration of this legislation, the windfall or dual benefit, defined in the Jurisdictional Statement and in this brief, was identified as the single cause for the then impending financial collapse of the program.

It was thus apparent to the members of the Joint Committee established by the Congress and to the Congress that the Railroad Retirement system could no longer tolerate the continuance of this unique element. The result was the elimination of the dual benefit, but in so doing the Congress prescribed a savings clause for those railroad employees with respect to whom the Congress identified a federal obligation. Financing of this vestigial element was to be undertaken by the Federal Treasury. It was in this area that lines had to be drawn and were drawn based upon long standing and traditional considerations applied by the Congress throughout four decades of Railroad Retirement legislation. Although there may have been options with respect to the manner of drawing lines of this nature, the distinctions made by the Congress in defining the "grandfathered" clause were hardly irrational. Moreover, if the decision below is not reversed, it will

destroy the delicate balance drawn by the Congress in the "grandfathered" class, and will require an additional $2.38 billion expenditure over the next twenty years. (Jurisdictional Statement, p. 15, n.8).

STATEMENT OF THE CASE

In *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979), Mr. Justice Blackmun characterized the Railroad Retirement Act of 1974 (88 Stat. 1305, 45 U.S.C. §§ 231-231t (1976 ed.)) "in its modern form," as reflecting "both a private pension program and a social welfare program" providing two tiers of benefits reflecting this dichotomy. "The upper tier, [the Railroad Retirement or staff component] like a private pension, is tied to earnings and career service . . . . The lower, and larger tier of benefits [the Social Security component] corresponds exactly to those an employee would expect to receive if he were covered by the Social Security Act." *Hisquierdo* at 574.

More importantly, the Court further noted in *Hisquierdo* that "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, or even eliminate, them at any time" (at page 575). It should be stressed, however, that the Railroad Retirement system is a closed system, historically supported through Railroad Retirement taxes paid by employees, and by the railroads. Similarly, the costs of administration of the Railroad Retirement Board are supported exclusively by the railroad industry through the payment of railroad taxes so earmarked.

This case involves the treatment by Congress in 1974 of those hybrid or unique benefits called dual benefits resulting from the interplay of the Railroad

Retirement Act and the Social Security Act (42 U.S.C. §§ 301 *et seq.*); that is, from the employment of an employee in railroad work and non-railroad work either concurrently or at differing points in his employment history. Prior to 1974, a railroad employee could acquire Social Security credits through daily or weekly employment following the conclusion of his hours or days of railroad employment (a practice which has sometimes have been referred to as "moonlighting"), or an employee could have accumulated sufficient quarters for Social Security coverage through non-railroad employment prior to or subsequent to his railroad employment. In either case, sufficient quarters of coverage in his non-railroad employment together with sufficient years of service in his railroad employment would have and did result in vesting under each of these systems.

In these cases, the Social Security benefit plus the Social Security equivalent within the railroad retirement benefit will always exceed the amount of a Social Security benefit which would have been paid if based on combined railroad and non-railroad earnings. Stated in terms of the Railroad Retirement Act of 1974, the Social Security component of the Railroad Retirement benefit based on railroad earnings (Tier I) plus the Social Security benefit based on non-railroad earnings, calculated separately, will exceed the amount of the benefit which would have been payable if both the railroad and non-railroad service had been combined in a single Social Security calculation.

The windfall or excess dual benefit, which is the subject of this proceeding, is the difference between these two sums, that is, (1) the amount by which the sum of the separate Social Security benefits, one based

on railroad service only and one based on Social Security service only, exceeds (2) the single benefit based on the combined railroad and social security service.

The flawed coordination of the two systems resulting in the payment of this windfall benefit during the decades prior to the challenged 1974 legislation had the unfortunate result of draining the railroad account of approximately $4 billion.

In 1974, it was established that the actuarial deficit of the Railroad Retirement system had escalated to $529 million each year or 9.05% of the 1974 payment. $451 million of this annual shortfall or 7.72% of payroll was directly attributable to the windfall benefit. It was recognized by the Joint Committee and by the Congress that a deficit of these enormous dimensions, if untreated, would destroy the railroad pension system within a short period of time. The Committees in each Branch of the Congress agreed "that resolution of the so-called 'dual' benefit is central both to insuring the fiscal soundness of the Railroad Retirement system and in establishing equitable retirement benefits for all railroad employees." H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974) p. 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974) p. 11 (hereinafter referred to as "Committee Reports" where the reports are substantially identical in substance or in pagination).

The Committee Reports recognized that "the most difficult proposal in this regard, involves the manner in which the dual benefit should be phased out on an equitable basis" and thereafter proceeded to define the operation of the savings provision with its lines of demarcation establishing the "grandfathered class." Committee Reports at p. 11.

The Committee Reports explained that since the "deficit in the railroad retirement system has occurred because of Congressional action," with respect to Social Security legislation (as well as an earlier Congressional repeal of restrictions on dual benefits), the bill, as reported, provided "that appropriations be made to cover the costs of phasing out dual benefits" as delineated by the savings provisions; that is, that the cost of supporting the circumscribed dual benefit programs, estimated on a level basis of $285 million through the year 2000 or $7 billion 1974 dollars, should be absorbed by the Federal Treasury and not by Railroad Retirement fund which lacked the capacity to carry this heavy burden. Committee Reports at pp. 4 and 5.

It was on this precise point that President Ford rested his veto of the 1974 legislation. In his veto message of October 4, 1974, he stated that "This bill proposes to solve the financial problems of the Railroad Retirement system by placing a seven billion dollar burden on the general taxpayer, requiring him to contribute $285 million to the Railroad Retirement Trust Fund for the next 25 years." Legislative History of the Retirement and the Railroad Unemployment Insurance Systems, Railroad Retirement Board (1978) at page 470.

The House of Representatives overrode the veto by a vote of 360 to 12. The override vote in the Senate was 72 to 1. Legislative History, *supra* at 472.

It was subsequently determined that the $285 million estimate of the cost of maintaining the phased out dual benefit within the limits of the savings provision had been calculated on a static basis; that is, without allowance for inflation. Current recalculation on a level basis through the year 2000, adjusted for in-

flation, made by the Comptroller General of the United States places the dual benefit cost figure at $415 million per year over a 21-year period or approximately $8 billion. As noted above, the redrawing of the line by the District Court would increase this figure by an amount of $119 million for each of the next 20 years or approximately $2.4 billion overall.

Congress has yet to appropriate the full amount of this phase out cost as defined by the Act, and as recalculated by the Railroad Retirement Board in its 14th triennial actuarial evaluation.

ARGUMENT

The District Court's decision utterly failed to comprehend the nature and purpose of the restructured Railroad Retirement legislation. Further, the District Court ascribed a lack of knowledge on the part of the Congress which does not bear analysis when the legislative history is examined. Finally, and most importantly, the District Court usurped the legislative power of the Congress by judicially amending a validly drawn and constitutionally permissible statute. Fundamentally, this case involves a judicial disagreement with a proper legislative judgment.

The District Court correctly held, and appellee does not contest, that this case does not involve a fundamental right or a suspect classification. *See, e.g., San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 16-39 (1973). Therefore, the only basis for the District Court's opinion is that the legislation at issue manifested a patently arbitrary classification, utterly lacking in rational justification. *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959); *Cf., Weinberger* v. *Salfi,* 422 U.S. 749,

768 (1975) (Fifth Amendment due process requirements are fulfilled if Fourteenth Amendment equal protection standards are met.)

The District Court, in deciding that the delineation by the savings provision in Section 231(n) of the Railroad Retirement Act excluding the members of appellees' class from the "grandfathered class" had no reasonable relation to the purpose of the statute (J.S. App. 30a) failed completely to perceive the nature and purpose of the restructured legislation. Nothing could be clearer than the perception by the Congress that the precipitous slide of the Railroad Retirement system into insolvency and eventual bankruptcy was due almost entirely to the growing weight of the dual benefit, resulting from the amendments to the Social Security Act as well as the repeal of earlier legislative restrictions on dual benefits.

As this Court noted in *Hisquierdo,* the obligation to pay dual benefits was and is not contractual, but may be altered at any time, as it had been in the past, or even eliminated, as it was by the 1974 Act.

In abolishing dual benefits in 1974, the Committee of the Congress reported to their respective Bodies that "a windfall no longer will be possible except insofar as the bill preserves benefits for those beneficiaries or employees whose equities entitle them thereto." Committee Reports at p. 11. The Committee Reports then characterized the problem of structuring the "grandfathered" class "whose equities entitle them" to limited preservation as "most difficult." The reports thereupon proceeded to explain precisely how the lines were proposed to be drawn.

It nowhere appeared that Congress was intent upon protecting "completely" the expectations of all persons, regardless of their attachment to the railroad industry, so long as they were fully insured under Social Security and had accumulated at some point in their working lives at least ten years of railroad service.

The contrary is the fact. The delineations and classifications were explicit and clear.

The problem of identifying financial resources other than Railroad Retirement for the support of the preserved dual benefit was obviously a most severe one, witness the position of the Administration on this point as reflected in President Ford's message on his veto of the bill, described above.

The delineation of the "grandfathered" class based upon attachment to the railroad industry so deliberately drawn by the Congress on the precedents and policies in other aspects of the Railroad Retirement Act throughout its legislative history is obviously rational and is intimately related to the legislative purpose to eliminate the financial drain which threatened the continued existence of the Railroad Retirement System. It was clear from the very beginning of the legislative deliberations that the dual benefit had to be abolished. The Congressional concern was over the extent and manner of the phase out, if indeed there was to be one. Because cost was an overriding factor and since it could not in any sense be borne by the Railroad Retirement Account, the problem was to find a new source of funds for that part of the program which was to be maintained on the foregoing basis.

In selecting the Federal Treasury as the new source for financing the phased out benefits, the Congress drew

lines recognizing equitable entitlement in a way most compatible with the appropriation concerns which so deeply troubled the Administration.

It is not the office of the Judiciary to cavil with the Congress over what would have been the best legislative choice. Yet that quite clearly appears to be the true basis of the District Court's decision. Not being required to fund the Act's requirements, the District Court has redrawn the statute to make it more equitable in its own perception. In so doing, the District Court essentially usurped the power of the Congress. For just as surely as Congress could have eliminated the benefits altogether (*Hisquierdo, supra*), so too could it draw rational lines in eliminating the overpowering burden of the dual benefit. *New Orleans* v. *Dukes,* 427 U.S. 297, 305 (1976). The fact that the District Court did not agree with those lines is of no consequence.

The Congressional judgment must be permitted to stand where the lines drawn are not patently arbitrary, and particularly where the effect of the District Court's redrawn statute would be to further drain the Treasury in such burdening sums.

CONCLUSION

For the reasons stated herein, and for the reasons stated in the briefs of the Government and the National Railway Labor Conference, this Court should reverse the District Court's decision.

Respectfully submitted,

EDWARD D. FRIEDMAN
CLINTON J. MILLER, III

HIGHSAW, MAHONEY &
FRIEDMAN, P.C.
Suite 210
1050—17th Street, NW
Washington, D.C. 20036
(202) 296-8500

Attorneys for the Railway Labor Executives' Association as Amicus Curiae